

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.5179 OF 2005

The Pune Municipal Corporation  
through Municipal Commissioner

versus

Bhavarlal Badrinarayan Phpphaliya Respondent

Shri R.G.Ketkar for petitioner.

Shri A.V.Anturkar with Vilas B. Topkir for  
respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 03.02.2006

DATE OF PRONOUNCING THE JUDGEMENT : 28.04.2006

**JUDGEMENT :**

1. Rule. Respondent waives service. Heard  
forth with by consent.

2. By this petition under Article 227 of Constitution of India the petitioner Municipal Corporation of City of Pune (for short "PMC") challenges the judgement and order dated 11th April 2005 delivered by 9th Ad-hoc Additional

District Judge, Pune in Miscellaneous Civil Appeal No.997 of 2005. This appeal was filed by the petitioner herein to challenge a judgement and order dated 25th February 2005 delivered by learned Joint Civil Judge, Junior Division, in Regular Civil Suit No.1973 of 2004 (for short "RCS No.1973 of 2004").

3. RCS No.1973 of 2004 was filed by the respondent-original plaintiff against the petitioner for a declaration that notice bearing No.1183, dated 18th December 2004 issued by the Assistant Engineer, Building Department of the petitioner is illegal, null, void and not in accordance with the Bombay Provincial Municipal Corporation Act, 1949 (for short "BPMC Act"). In pursuance of this declaration, respondent sought to restrain permanently the petitioner, its agents, servants, employees or any other person acting through them from demolishing the suit premises.

4. The case of the respondent is that suit property described in paragraph 1 of the plaint is subject matter of the notice. According to the respondent, his father Badrinarayan Phophalia was a Lessee in respect of a shop situate on

Final Plot No.56 (Plot No.28) commonly known as Bhaiyyawadi, Mumbai-Pune Road, Pune. It is the respondent's case that Pune Municipal Corporation (for short "PMC") decided to widen the Mumbai-Pune Road. The shop of his father was affected by proposed road widening. Accordingly, concerned authorities requested his father to co-operate with them by surrendering his shop. The father of respondent surrendered the shop owned by him without accepting any sort of compensation whatsoever.

5. After the said surrender, the Additional Commissioner, PMC was pleased to issue letter dated 28th December 1990 allotting an area admeasuring 20x10 feet near Hotel Manali to the respondent's father for the purpose of setting up a Grocery Shop. However, some conditions are imposed in the letter of allotment issued in favour of the father of respondent.

6. An agreement was entered into by respondent's father and the Additional Commissioner of PMC.. The Agreement was of lease is dated 16th May 1996. It was subsequently registered with the Sub Registrar, Haveli. The lease agreement was for a period of 99 years commencing from the date

of allotment of alternate permanent land i.e. from 7th January 1994.

7. Upon an affidavit executed by the father of respondent on 13th January 1999, PMC transferred said shop in favour of the present respondent and now his name is entered in all records. On 4th July 2000 an agreement was entered into between respondent and PMC regarding the suit property.

8. After setting out the terms and conditions of the agreement as also permissions granted to the structure constructed on the suit property, in the plaint, it is contended by the respondent that the structure is duly sanctioned by PMC.

9. It is the case of the respondent that he is carrying on business in the said shop of selling Grocery Articles in the name "Majisa Market".

10. Paragraphs 9 to 11 of the plaint are relevant for the purposes of present petition and are reproduced hereinbelow :-

"9) The plaintiff submits that the plaintiff had erected a temporary shed by way of protection from the sun light and rain, admeasuring 20' by 4' and a

temporary wall admeasuring 10 ft. long and 3' in height so as to protect the visitors from falling into the nallah, in front of the aforesaid shop. The Assistant Engineer issued a notice bearing No.0001160 on 10/12/2004 and directed the plaintiff to remove the aforesaid temporary shed and wall in front of the said shop. The plaintiff on the receipt of the aforesaid notice immediately removed the aforesaid temporary structures in front of the said shop on 11/12/2004.

10) the plaintiff further submits that on 18/12/2004 at about 12 p.m. in the afternoon two officers by name Shri Bashone from Vikas Yojna Department and Shri Thopate from building department visited the suit property. They carried out some measurements. After carrying out some measurements they informed the plaintiff that the suit property or the entire shop of the plaintiff was coming under the road widening line and therefore, it will have to be demolished. The plaintiff was shocked and surprised by such information. Therefore, he immediately visited the Bhumi Jindagi and Building Department of the Defendant Corporation and tried to bring the facts to the notice of the concerned officers. However, the concerned officers gave evasive replies to the plaintiff.

11) The plaintiff was under tension and he came back to his shop on the suit property at about 4.45 p.m. Thereafter the plaintiff was shocked to receive a notice bearing No.0001183 dated 18/12/2004 at 5.30 p.m. on 18/12/2004. By virtue of the aforesaid notice the defendant corporation stated that the entire shop of the plaintiff admeasuring 20' by 10' that is totally 200' along with the shed of 20' by 4' and wall of 10' long and 3' height was illegal and the same was coming under the road widening line of the Pune Mumbai Road. The defendant Corporation further directed the plaintiff to remove the entire construction mentioned in the notice with immediate effect. The

defendant corporation further directed the plaintiff to remove the entire construction mentioned in the notice with immediate effect. The defendant corporation further threatened that if the plaintiff failed to do so, the corporation shall demolish it and shall charge the expenses incurred thereon from the plaintiff."

11. In the light of the above averments it is contended that the respondent is unable to appreciate the stand of PMC declaring the construction duly sanctioned by it to be illegal. He submits that PMC is estopped from taking such a stand. He submits that all licenses have also been issued and/or renewed and he is paying taxes regularly. He submits that the grocery shop is his source of livelihood.

12. In these circumstances, if the PMC acts upon the notice, grave loss, irreparable harm and injury will be caused to the respondent and which is incapable of being compensated in money. Thereafter, in paragraph 18 of the plaint this is what is stated :-

"18. The plaintiffs apprehend that the Defendant's officers might take a drastic step and enter into the premises and might demolish the entire structure and therefore the plaintiff is constrained to file the present suit. The plaintiff

submits that the cause of action for filing this present suit firstly arose on 18/12/2004 when the defendant issued a notice bearing 0001183 to the plaintiff. The cause of action continues to arise day to day and hence the suit filed is well within limitation."

The above is the basis for the suit.

13. An application for interim injunction was made in the above suit claiming following interim orders/reliefs :-

A) That during the pendency of this suit the defendants its agents, servants, employees or any other person or agency claiming through them may kindly be restrained by an order of temporary injunction from demolishing the suit premises as per the notice dated 18/12/2004 bearing No.0001183.

B) Ad-interim reliefs in respect of prayer clause no.(a) may kindly be granted.

C) Any other order just and proper in the interest of justice may kindly be passed."

14. The averments to support this application read thus :-

9) The Plaintiffs submit that they have carried out the work in accordance with the sanction plan of the Pune Municipal Corporation and he has not violated the

road widening line as alleged by the Defendant Corporation. The entire structure of the shop has been constructed as per the sanction plan and as per the terms and conditions given in the commencement certificate issued by the Defendant Corporation. Despite this fact, the Defendant and its office bearers are threatening to demolish the entire suit premises. The Plaintiffs submit that if the Defendant Corporation succeeds in doing so, the Plaintiffs may suffer irreparable loss, which cannot be compensated in the terms of money. The bread and butter and in other words the survival of the plaintiff and his entire family is dependent upon the shop. As such the plaintiff has a strong prima facie case and the balance of convenience lies in favour of the plaintiff. The plaintiff, having a strong prima facie case is likely to succeed on merits. In the mean time if the defendant corporation succeeds in its illegal attempts of demolishing the suit property the very purpose of filing of this suit will become infructuous. The plaintiff therefore is constrained to file the present application praying for interim as well as ad-interim injunction."

15. The petitioner Corporation filed a reply/written statement and raising challenge to the jurisdiction of the Trial Court also contended that the suit structure is coming in road widening area of proposed 42 meter Mumbai-Pune road and in order to avoid danger on account of accidents, it was absolutely necessary to demolish the structure. It is contended that even assuming that the permission was granted to the plaintiff for construction still the said

construction was subsequently found to be infringing the proposed road widening line of 42 mts. of Bombay Pune Road and in the interest of public and for their convenience action was taken by the defendant Corporation on 20 Dec. 2004 before 12 noon and the present suit was filed subsequently and the orders were not within the knowledge of the present defendant when action of demolition was taken. The present suit has become infructuous as a result of demolition and hence the plaintiff is not entitled to claim any relief as prayed for in the suit. It is at this stage that the respondent files an application Exhibit-18 (Page 172 of the compilation) for restoration of status-quo ante. This application is filed on 6th January 2005. An order was passed on this application on the very day i.e. 6th January 2005 directing petitioner to file say. It appears that no reply/say was filed by the petitioner to this application till 1st February 2005 and hence the Trial Court held that the hearing on this application will proceed without any reply by the PMC..

16. The application Exhibit-18 has averments from paras 2 to 10 indicating that the structure was substantially demolished on 20th December

2004. The Trial Court took up applications Exhibits 5 and 18 and delivered its order on 25th May 2005. The Trial Court has recorded that respondent-plaintiff has made out a prima facie case, balance of convenience lies in his favour and he will suffer irreparable loss. It is pertinent to note that while framing the points and rendering findings, the Trial Court framed following point :-

"4) Whether the plaintiff is entitled to restore suit shop in the form of status-quo ante as on the date of filing of the suit?"

The finding on this point no.4 is in the affirmative.

17. The reasons for abovementioned finding are set out in paragraph 23 of the order of Trial Court. According to the Trial Court, the suit shop was demolished on 20th December 2004. According to the Trial Court, the Corporation demolished the structure/suit property when status-quo was in existence. The Trial Court refers to a complaint made to the local Police Chowky. It is in these circumstances that the Trial Court considers respondent-plaintiff's

prayer for mandatory injunction. It proceeds on the basis that the shop is the source of livelihood and respondent-plaintiff having been deprived of the same, restoring status-quo ante would meet the ends of justice. The order of Trial Court reads as under :-

"ORDER

- 1) The application Exh.5 is allowed.
- 2) The defendant Corporation is hereby temporarily restrained to act on the suit notice dated 18/12/2004 bearing No.0001183 till disposal of the suit.
- 3) Application Exhibit 18 is allowed.
- 4) The defendant Corporation is hereby directed in the order of temporary mandatory injunction to restore the suit shop i.e. to reconstruct the suit shop in terms of building permission issued by the Corporation under Commencement Certificate No.198 dated 11/03/1994 along with the furniture, fixture, fitting and stock in trade and articles and things mentioned in the schedule at its costs on or before 31/03/2005 and report it to the court.
- 5) The plaintiff is hereby directed to give undertaking that he will reimburse the cost to be incurred by the Corporation for compliance of the above order if he failed in the suit.
- 6) Undertaking shall be given in the proceeding under the copy to the defendant Corporation.
- 7) Costs in cause."

18. Petitioner aggrieved by this order preferred Miscellaneous Civil Appeal and in the memo of appeal one of the grounds which the petitioner Corporation raises is that the learned Trial Court should not have granted status-quo ante.

19. The Lower Appellate Court heard this appeal and on 11th April 2005 dismissed the same. The finding of Lower Appellate Court at paragraph 14 is that inspite of service of notice and summons on 20th December 2004 at about 10.30 a.m., on the same day, at about 12.00 noon, the petitioner started demolishing the suit structure. Thus, according to the Lower Appellate Court this action is high handed and lacks bona fides. The order proceeds on the basis that the Trial Court's direction of status-quo is ignored and structure has been demolished by the petitioners. In the light of this conclusion at paragraph 16, the Lower Appellate Court, after observing that the suit shop was standing on the date of suit and before service of summons to petitioner, faulted the action of it's alleged demolition. Thus, the Trial Court's order was upheld and the appeal was dismissed.

20. The present petition is filed challenging

these orders.

21. At this stage it is material to note one development namely that the respondent-plaintiff presented an application Exhibit-20 invoking Trial Court's power under Order XXXIX, Rule 2A of the CPC.. Respondent is praying that the Trial Court should take action against the petitioners for disobeying the orders and directions passed by it and attaching the Corporation building situate at Shivaji Nagar, Pune 411 005 and all movables lying in the office/chamber of the Municipal Commissioner in the Corporation building including the table, chair of the Municipal Commissioner and all other furniture, fixtures, etc. lying in the said office of the Municipal Commissioner, and thereafter selling the same and from such sale proceeds compensate the respondent- plaintiff. So also, the officers of petitioner be detained in the civil prisons. The above application is filed on 6th January 2005. Thereafter another application was presented on the same day (Exhibit-21) invoking Trial Court's power under Order XXXIX, Rule 11 of the CPC praying that defence of the petitioner-defendant be struck off and the suit should proceed further in accordance with law. I

am informed that these applications are pending.

22. When this writ petition appeared for admission before this Court, after hearing learned counsel for the petitioner and the respondent this Court passed following order (Coram : S.A.Bobde, J.) :

"Mr.Ketkar, learned counsel for the petitioner undertakes to serve the caveator.

In the mean while, the Executing Court shall not proceed for a period of two weeks.

S.O. two weeks."

This ad-interim order has been continued from time to time.

23. Thereafter, a without prejudice proposal was made on behalf of petitioner to the respondent stating that an area admeasuring 400 sq.ft. would be provided to the petitioner. That proposal was later on found to be acceptable. When this matter once again appeared in October 2005 an order by consent was passed in following terms (Coram : S.A.Bobde, J) :-

"Heard Mr.R.G.Ketkar, learned counsel for the petitioners and Mr.A.V.Anturkar for the Respondent.

Following order is passed by consent:-

The Municipal Corporation may proceed with the construction over the disputed area and shall complete the construction as expeditiously as possible and in any case, not later than 30th December, 2005.

S.O. 2nd January 2006."

Thereafter, an affidavit has been filed by the petitioners to the effect that construction of shop premises admeasuring 200 sq.ft. would be made for the respondent. Paras III and IV of the affidavit of 27th January 2006 filed by the petitioner read thus:-

III. I say that pursuant to the Order passed by this Hon'ble Court, the P.M.C. invited the Tenders for construction of 200 sq.ft. shop of the Respondent along with construction of slab on nalla. The tenders were accepted by the Additional Municipal Commissioner (Special) of the P.M.C. and the Work Order is issued on 27.1.2006 Order No.53/6. As directed by this Hon'ble Court, I am enclosing herewith the plan of proposed construction of 200 sq.ft. shop for the Respondents. Annexed hereto and marked as Exhibit "2" is the copy of the said plan. I say that the Respondent's shop will have the necessary frontage.

IV. I further say that the construction of the aforesaid shop will be completed by the P.M.C. within two months from today. I say that perusal of plan at

Exhibit "2" will displace the apprehension of the Respondent having regard to its height above the drainage line as also as the proposed construction is away from the manhole. I crave liberty to this Hon'ble Court to make appropriate submissions at the time of hearing of the above writ petition."

This proposal on affidavit does not appear to be acceptable to the respondent because he has filed a rejoinder affidavit dated 29th January 2006. Paras 3, 4 and 10 of this affidavit read thus :-

"3. I say that, the proposed alternative site which is sought to be given to me, by the Municipal Corporation if shop is constructed it will be on the Nala and I will be pushed back by a distance of 10 ft. from the original place which was allotted to me.

4. I say that, in that eventuality, I will not get the opening frontage on the road, because it will not be under the control, even of the Municipal Corporation also, to stop the portion in between the road and the new alternative site, which is offered to me, which is a portion of 10 ft. being encroached upon by the other persons. In that eventuality, my shop is bound to be adversely affected.

10. I say that, the whole object of pushing me back by 10 ft. from the main road, is for the purpose of somehow justifying the high handed action, which has been taken by the Municipal Corporation. I say that, if the Municipal Corporation would have come fairly with the case that, it has actually committed a mistake by demolishing my shop and would have prayed for the help of this Hon'ble Court, then

a lenient view from this Hon'ble Court could have been prayed for. However, the Municipal Corporation is coming with the stand in the Affidavit, that they were justified in demolishing my shop then, the question as to whether my shop was really coming in the road line or not, is to be seen and the proposal which has been given by the Municipal Corporation, is therefore not acceptable to me and I pray that the matter may be heard on merit."

With regard to certain allegations about other construction/structure, the petitioner filed a further affidavit in this Court and denied the allegations. In any event, it is contended by the petitioner Corporation that with regard to the construction mentioned in the affidavit dated 29th January 2006 action is being taken by issuing notices and the PMC will follow due process of law and ensure that road widening line prescribed for Mumbai-Pune Road (Engineering College Chowk, Mariaai Gate) in the revised Development Plan sanctioned on 5th January 1987 is maintained after taking possession of the structures that are constructed with the permission of PMC, by following due process of law.

24. Since the proposal of the petitioner is not acceptable to the respondent, I have proceeded to

hear the parties on merits.

25. At the outset Shri Ketkar - learned counsel appearing for the petitioner submits that the petitioner is still agreeable to provide accommodation as per the affidavit filed in this Court and statement made in that behalf. However, in his submission, the order under challenge granting status-quo ante is ex-facie bad in law. It is vitiated by serious error apparent on the face of record. In his submission, grant of such an order is an exception and not a rule. Such order cannot be passed as a matter of course. Such order has drastic consequences inasmuch as the suit virtually stands decreed by mandatory order and injunction. Such order to be passed at the interlocutory stage, must be justified by strong prima facie case and irreparable loss and injury which cannot be compensated in money at all. He relies upon decisions of Supreme Court and this Court emphasising this aspect.

26. That apart, according to Shri Ketkar, the impugned order proceeds on a total misconception of facts. He submits that the basis upon which the Courts below have proceeded, is that despite

being intimated by the respondent about passing of an status-quo order, the PMC proceeded to demolish the suit structure. He was at pains in pointing out that demolition had begun before plaint and proceedings were served and neither is there breach or violation of order of status-quo nor the action of the PMC can be termed as illegal.

27. Shri Ketkar has invited my attention to the averments in the application wherein respondent states that the Trial Court was pleased to issue notice on the application (Exhibit-5) and posted the matter on 20th December 2004. Notice of said application at Exhibit-5 and suit summons were immediately served on 20th December 2004. It is pointed out that this notice was served at about 10.30 a.m. and till the service of suit summons and notice, the shop was in existence.

28. Shri Ketkar submits that this is not the factual position at all. He submits that the say was filed and the contention raised therein is to the following effect :-

... ..

5. That the order below Ex.5 purporting to be the order of status quo was not received through court but the advocate for plaintiff vide letter dt. 20 Dec. 2004 informed the Commissioner of Pune Municipal Corporation that the court directed the status quo in respect of the suit property till 23rd Dec. 2004. The said letter was received by the Reception Counter of the Municipal Commissioner on 21 Dec. 2004 vide Inward No.201-3582 and the same was forwarded to the Legal Department of the Corporation on 22 Dec. 2004 vide Inward No. MP/IN/4322 and the same was received by Building Control Department on 23 Dec. 04 under Inward No.10379 and the action of demolition of the structure coming in the road widening line was removed by 12 p.m. The action was started in the morning of 20 Dec. 2004 and the same was completed by afternoon and thus, the whole process of demolition was completed before the order of status quo and thus it is wrong to allege that the officers of the Corporation committed breach of the order of Court. In fact, at the time of action there was neither injunction order nor order of status quo and hence the present application is not maintainable and deserves to be dismissed with compensatory cost. In the circumstances mentioned above even on the showing of the plaintiff the action was completed by the Corporation and there is no breach of any order of the court."

He also invited my attention to the order of learned Trial Judge where the learned Trial Judge has taken cognizance of the pleas raised in the light of above set out factual position. However, the learned Judge has committed an obvious error by observing that the petitioner was aware of the order passed by the Trial Court

and that it is effective till 23rd December 2004. Shri Ketkar has invited my attention to an application which is filed by the respondent herein on 20th December 2004 (Exh.14) and the order below same. In the application, the respondent's case is thus :-

... .. Today defendant has  
partly demolished the suit property."

Further, it is prayed that it is necessary and in the interest of justice to direct the petitioner-defendant to maintain status-quo with respect of the suit property. Thus, the entire case that the demolition was started and completed in the teeth of the order of status-quo passed by the Trial Court, is fallacious to the knowledge of respondent- plaintiff.

29. On the other hand, Shri Anturkar - learned Counsel appearing for respondent submits that the structure which is legal and authorised, has been demolished. The action of PMC is high handed and illegal. The Trial Court and the Lower Appellate Court were well within their powers to grant mandatory order and more so because of the question of livelihood of respondent herein. In

these circumstances, there is no warrant for interference with the prima facie findings and that too based on documents and materials produced. This is not a Court of further appeal. If prima facie findings of fact are binding, then it is not open to this Court to interfere with the same. More so, when they are not demonstrated to be perverse. Shri Anturkar has submitted a compilation of documents and has invited my attention to number of documents therein. He submits that when the respondent complies with the direction and shifts his structure earlier, the PMC cannot deprive him of his source of livelihood. He has invited my attention to the affidavits filed and has contended that if the action was not high handed and illegal, then there was no question of making an offer for reconstruction or of shifting the respondent to some other premises. He submits that the fact that the PMC knows that it has demolished an authorised and legal structure and has not touched others, speaks volumes of its conduct and, therefore, the petition deserves to be dismissed..

30. In the light of rival contentions, the question that falls for my consideration is

whether any interference is necessary with the order passed by the Trial Court restoring status-quo ante. Before any finding is recorded, it will be necessary to advert to the settled principles while considering an application for grant of mandatory order and injunction. More so while restoring status-quo ante.

31. In a decision reported in AIR-1990-SC-867 (Dorab Cawasji Warden Vs. Coomi Sorab Warden and others) the Hon'ble Supreme Court has observed thus :-

"14. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory

injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

15. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

If the present application made for restoration of status-quo ante is to be decided in the light of the above principles, then it is clear that no case is made out for grant of mandatory order and direction at this stage. When the respondent-plaintiff earlier files an application for temporary injunction in which he proceeds on the basis that demolition has not begun and the same party brings it to the notice of the Court by a further application that structure is partly demolished, then all that the Trial Court and Lower Appellate Court could have granted is an interim order restraining the PMC from

demolishing the structure further. This also can be done provided it is prima facie established that the structure is not already demolished completely or is partially demolished. In other words, further demolition can be stopped by an interim order after recording findings on other issues. The PMC has invited my attention to the order of Trial Court below, further Application made on 20th December 2004 and wherein Trial Court has noted that the petitioner's advocate was not present. However, upon perusal of the record and photographs, the Trial Court directs the parties to maintain status-quo.

32. The Courts below ought to have appreciated that there is no dispute with regard to the fundamental aspects namely that PMC and the Commissioner have been given wide powers under the Bombay Provincial Municipal Corporation Act as also under Planning Laws, to prescribe a road line and/or alter the road line already in existence. In the present case, it is not in dispute that the premises are on the Mumbai-Pune Road. Therefore, not only in law but also under the lease agreement ample powers are conferred on PMC to call upon the respondent to shift the premises and/or remove them, if they are

affecting existing road line or the one newly marked by them. That such a stipulation is there in the agreement and other documents, is not in dispute. It is also material to note that in the plaint itself the respondent has averred that on 10th December 2004 he has received a notice from PMC to shift the structure and/or portions thereof stipulated in the notice. It is his case that he has complied with this notice. Thus, it is not as if on 18th December 2004 a notice was clamped upon the respondent and he was taken by surprise. The explanation which has been given for calling upon the respondent to do so, is that because of increasing accidents the PMC had to act with expediency and take steps for widening the road. Thus, this was a case of PMC being required to act in public interest and for performing a public duty. Such an action cannot be faulted only because it was being implemented by removal of the structure of respondent before taking any steps with regard to other structures. Therefore, before recording any prima facie conclusions, the above vital aspects ought to have been taken into consideration. The Courts below ought to have realised that their observations in this case could have been utilised by other structure holders as well.

Hence, prima facie, it cannot be said that the PMC lacked complete jurisdiction and its action was, per se, void and illegal.

33. Merely because in the opinion of the Courts below the structure was erected by respondent with permission from the PMC, does not mean that the PMC is estopped for all times to come to call upon the respondent to shift the structure/premises. More so, when in the agreements and other documents the PMC was entitled to call upon the respondent to do so. Therefore, at the prima facie stage holding that the PMC could not have issued any notice or if at all it was empowered to do so it should have given 30 days time to the respondent to comply with its requisition, would have far reaching consequences. Such a finding would affect all matters and cases of similar nature either pending or arising in future. The Courts below should have been aware of this aspect as well. Hence, interlocutory orders which have the effect of deciding the main matter finally, should be passed with extreme care and caution. The Courts below have restrained the PMC from acting in furtherance of the impugned notice without clarifying as to what steps cannot be taken by the PMC hereafter and it also not

clarified as to whether the action already taken would be affected by such order or not. Therefore, it is necessary to clarify that the interlocutory orders of restraint, as passed, would only mean that PMC cannot permit anybody else also to occupy the portion of the land allotted to the respondent and on which the structure was erected by respondent, till hearing and final disposal of the suit. However, this does not affect the road widening work which may be undertaken by the PMC.. This clarification is necessary because the PMC has already expressed its willingness to provide alternate premises/ accommodation at its own costs to the respondent, which offer was initially accepted by him.

34. I have made the above observations while scrutinising the correctness of the findings recorded at the interlocutory stage by the Courts below. My views and findings should not be construed as a final word on the controversy in the suit. These views and findings are tentative and upon production of further materials the Trial Court can make appropriate orders at the hearing of suit including awarding damages.

35. Therefore, although I may have indicated

that the question arising for consideration is whether status-quo ante should be restored or not, additionally, I have to express the above views considering the issues involved in the matter. It also became necessary to express as aforesaid because Shri Ketkar submitted that the entire order of the Trial Court as well as Lower Appellate Court, is, ex facie, illegal and erroneous. Hence, the above views and clarification. Despite the expression as above, it would be open for the Courts below to record appropriate findings on the issues arising for their consideration in the suit including power of the PMC under the BPMC Act as well as relevant planning laws. It is not as if the structure and the construction being authorised and legal, that there is total absence of authority to initiate the impugned action but that is how the Courts below have proceeded, and, therefore, I have expressed my tentative views on the points framed for consideration by the Courts below.

36. In this behalf, the Courts below ought to have been careful and cautious. This has been emphasised by the Hon'ble Supreme Court from time to time. In Mahadev S. Shelke and others Vs. PMC and another reported in (1995)3-SCC-33 the

Supreme Court observes thus :-

"7. In Shiv Kumar Chadha Vs. Municipal Corpn. of Delhi a Bench of three Judges of this Court held that :(SCC p.175, paras 30,31)

... (A) party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles - ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and that the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him".

Further

"The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong

committed by a person who approaches the court."

"8. In Dalpat Kumar v. Pralhad Singh, a Bench of two Judges (in which K.Ramaswamy, J. was a member) of this Court held that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused.

"12. In Modern Law Review, Vol. 44, 1981 Edn; at page 214, R.A. Buckley stated that **"a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant.** It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages".

"14. It would thus be clear that in a suit for perpetual (sic) injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff could adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of

public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant an interim injunction. While exercising discretionary power, the court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the work etc. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor be a bar to award damages beyond its pecuniary jurisdiction. In this behalf, the grant or refusal of damages is not founded upon the original cause of action but the consequences of the adjudication by the conduct of the parties, the court gets inherent jurisdiction in doing ex debito justitiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. It is common knowledge that injunction is invariably sought for in laying the suit in a court of lowest pecuniary jurisdiction even when the claims are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons. Therefore, the pecuniary jurisdiction is not and should not stand an impediment for the court of first instance in determining damages as part of the adjudication and pass a decree in

that behalf without relegating the parties to a further suit for damages. This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff.

15. Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose was delayed. As a consequence execution of the project has been delayed and the costs now stand mounted. The courts in the cases where injunctions are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. In the event of the plaintiffs losing the suit ultimately, they should necessarily bear the consequences, namely, escalation of the cost or the damages the Corporation suffered on account of injunction issued by the courts. Appellate court had not adverted to any of the material aspects of the matter. Therefore, the High Court has rightly, though for different reasons, dissolved the order of ad interim injunction. Under these circumstances, in the event of the suit to be dismissed while disposing of the suit the trial court is directed to assess the damages and pass a decree for recovering the same at pro rata against the appellants."

37. Thus, public interest is paramount and a very important and relevant factor. While not allowing public bodies to act against any one high handedly and arbitrarily, the Court must bear in mind larger public interest in such matters. The Trial Court has ignored a very vital aspect of the matter namely that the action

of demolition was already completed on 20th December 2004 at about 12.00 in the after noon. In fact, in the order passed by the Trial Court, it is observed that the case of plaintiff is that the shop was in existence. The Trial Court has also noted the fact that a complaint was made to the local Police Station by respondent-plaintiff when the petitioner-defendant's representatives and officers as well as staff were removing the debris at site. It is in these circumstances, and when the Trial Court as well as Lower Appellate Court are aware that demolition was complete and it was considering an application for restoration of status-ante, that it was their bounden duty to scrutinize all materials carefully and cautiously. The discussion on point nos.4 and 5 in the Trial Court order proceeds on the basis that the petitioner has demolished the property. The demolition was complete on 20th December 2004 itself PMC had no knowledge of status-quo, was the submission. However, the PMC has proceeded to demolish despite knowledge of status-quo order is the finding, and, therefore, status-quo ante must be restored, is the conclusion.

38. In my view, that finding could not have been

recorded unless the Courts below were prima facie satisfied that the PMC proceeded to demolish the structure with full knowledge of the order of status-quo. From a perusal of the materials produced it is clear that the PMC was not aware of the order of status-quo when it proceeded to take the action in pursuance of the notice. In the light of it's earlier order the Trial Court should have satisfied itself as to whether it's order of status-quo was indeed served. The Trial Court's order refers to Roznama. The Roznama shows that on the application Exhibit-5 the only order was "Issue Notice". The Corporation took time to file say and Vakil Patra (Exhibit-12). That request is made by the petitioner-defendant in writing. Prior thereto, on the filing of the suit, on 19th December 2004, a summons/notice was issued by the Trial Court calling upon the petitioner to appear before it on 20th December 2004 at 11.00 a.m.. The Bailiff report dated 20th December 2004 shows that this summons/notice is received by PMC on 20th December 2004 at 10.30 a.m.. There is no status-quo order till this date. On 20th December 2004 the respondent's advocate addresses a letter to the Commissioner, PMC informing him of the status-quo order. This letter is received in the reception counter of

PMC on 21st December 2004.

39. On 20th December 2004 respondent-plaintiff files an application Exhibit-14 and the order of status-quo was passed below this application and that too in the absence of petitioner Corporation. Thus, it is not passed on the original application Exhibit-5. It is contended and in my opinion rightly that this order is passed after the demolition was under way or more or less complete. It was the duty of the Trial Court to satisfy itself as to whether the structure was in existence. It is clear from the materials produced before me as also compilation tendered by Shri Anturkar that the structure was not in existence when the Court was passing an order of status-quo and that is how the Trial Court has recorded its finding in para 23 of it's order. It's finding is "the plaintiff filed photograph list Exhibit-23A. Shows that on 20.12.2004 the Corporation has demolished the suit property. It shows that the slab up to road level and back side wall there in existence." Therefore, the basis upon which the Courts proceeded, namely, that the structure was demolished or action of demolition pertaining thereto commenced and continued despite

status-quo order being passed and communicated to the petitioner, is totally unfounded. That this fact alone is not something which prompted the Court to grant relief of status-quo ante, is also clear from a perusal of the impugned order.

40. I would advert to these factors a little later. However, I find that the Trial Court and the Lower Appellate Court misdirected themselves completely while holding that the structure was demolished despite order of status-quo. The Trial Court and Lower Appellate Court have criticised the petitioner for an high handed and arbitrary act. However, there appears to be no material to record such a finding and conclusion at a prima facie stage. If the Court was persuaded to pass an order of status-quo and after the said order being communicated the demolition continued, then dependent upon other factors, may be a different conclusion, could have been reached. However, when there is no basis to come to a conclusion that demolition commenced/ continued/ completed despite status-quo order of the Trial Court, then the impugned orders recording the same cannot be sustained. It may be that the PMC after noticing the Trial Court order still went ahead and

removed the debris or remaining portion of the wall but that is not which can persuade the Courts below to record that the demolition commenced and completed on 20th December 2004 despite status-quo order being communicated to PMC..

41. The Trial Court has while passing the impugned order relied upon the fact that the mandate of Article 21, granting life and livelihood, has been violated by the petitioner Corporation. Thus, the direction to restore status-quo ante is also issued in the light of this constitutional mandate being allegedly breached and violated. However, but for the bare word of respondent-plaintiff, there does not appear to be any basis for such a conclusion and finding. The averments in the plaint in that behalf are to be found at paragraphs 13 and 14. Admittedly, between the date of institution of suit and passing of the order by the Trial Court, a period of two months had already lapsed. Thereafter, the Lower Appellate Court passed it's order on 11th April 2005. However, in the judgement and order, there is no discussion with regard to the means of livelihood of respondent-plaintiff. There is no assertion that

this is the only source of livelihood. However, the Trial Court proceeds on the basis that it is admitted that the shop is the only earning source of the plaintiff. From where the Trial Court gets this admission and by referring to which material, is not at all clear from the impugned order. Whenever the Courts below hold that a fact is admitted, it naturally means that it is admitted by both sides and such admission can be inferred from the material placed on record. Such admission is also inferred, at times, by noting oral arguments. From the perusal of entire materials I am unable to accept this prima facie finding on the application Exhibit-18. I find nothing to support the above prima facie conclusion. Even if it is assumed that no say was filed to the application (Exhibit-18), yet, it was the bounden duty of the Trial Court to have satisfied itself before granting status-quo ante, that mandate of Article 21 of Constitution of India is violated by depriving respondent-applicant of his only source of livelihood. This should have been the approach because from a perusal of the plaint and Exhibit-18, it appears to me that respondent-plaintiff is making out a case for claiming damages. The averments are not for claiming status-quo ante alone. Therefore,

even other reason assigned for granting status-quo ante is patently untenable. The orders under challenge, therefore, cannot be sustained on this ground also.

42. In view of what is observed above, a case is made out for interference in this Court's jurisdiction under Article 227 of the Constitution of India. The orders under challenge overlook basic and fundamental principles while granting interlocutory reliefs of mandatory nature. Further, the Courts below have failed to appreciate the materials referred to above. Rather, they have been ignored by them. Thus, the findings are contrary to them as also vitiated by non-application of mind. Shri Anturkar's submission that the structure was outside the road widening line, is controverted by Shri Ketkar and he relies upon the plan in that behalf. There is nothing in the impugned orders which would indicate that the Courts have applied their mind to the alignment of Bombay-Pune Road or the markings in that behalf. This is one more reason for setting aside the impugned orders.

43. In the result, Rule is made absolute in

terms of prayer clause (b). However, there will be an interim order restraining the petitioner from allotting the land and/or the portion occupied by the structure (suit premises) to any person till the disposal of the suit. This order shall not prevent the petitioner from widening the Mumbai-Pune Road and including the portion of the land in question therein.

44. It would be open for the respondent-plaintiff to accept offer/proposal of petitioner placed before this Court on affidavit filed on 27th January 2006.

45. In the event respondent is not willing to accept the offer/proposal, he shall communicate his response to the same in writing within a period of three weeks from the date of this order.

46. In case the respondent is willing to accept this offer and communicates his response in that behalf to the petitioner in writing, then the petitioner Corporation shall provide shop premises, as assured, within a period of two months from the date respondent's acceptance is received by it.

47. Upon acceptance of offer by the respondent and the receipt of communication in that behalf by the petitioner, parties to place on record the same on the record of Trial Court and it would be open for the Trial Court to pass appropriate orders including disposing of the suit itself.

48. In the event no such agreement is reached then the Trial Court to endeavour and dispose of the suit in question as expeditiously as possible and in any event by 30th January 2007.

49. The Courts below to pass appropriate orders on other pending applications in the light of above.

50. It is clarified that all observations made by me are tentative and prima facie and shall not influence the Trial Court while disposing off the suit on merits and in accordance with law. All contentions of both sides in that behalf are kept open. In the circumstances there shall be no order as to costs.

(S.C.DHARMADHIKARI, J.)

P.C. :-

51. After the order was pronounced, Shri Anturkar, the learned counsel appearing for the respondent states that permission given by this Court to widen the road would mean that if ultimately the respondent succeeds in the suit, the premises are lost to him. In my view, it is not for me to go into this aspect. The Trial Court is free to pass appropriate orders, after all the evidence is led and the same is considered by it, in accordance with law. Needless to state that the Trial Court can always mould the relief as well.

(S.C.DHARMADHIKARI, J.)